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No. 551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JIM DEVRIES, ELECTRICAL WORKERS LOCAL NO. 426, OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, O. E. ROOT, AS PRESIDENT OF SAID LOCAL 426, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Petitioners*,

VS.

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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VS.

BAUMGARTNER'S ELECTRIC CONSTRUCTION CO., *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

CITATION

The opinion of the Supreme Court of South Dakota, which the petitioner here seeks to review, is reported in the September 24, 1958, advance sheet of the Northwestern Reporter. The citation is 91 N.W. (2d) 663.

EXPLANATION OF THE NATURE OF THE CASE

Counsel for the petitioner has misapprehended the character of the judgment entered in this case. They have needlessly included in their petition as appendices* B and D, pages 23A and 36A, the Findings of Fact and Conclusions

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* *All references to Appendices herein are to the Appendices in Petitioner's Brief.*

of Law of the trial court and defendant's proposed Findings of Fact and Conclusions of Law. As indicated by the State Court's decision (bottom of page 11A of petitioner's statement), the cause of action sounding in tort was tried to a jury. Only that part of the judgment based on tort and awarding damages was affirmed. Otherwise the judgment was reversed. (Petitioner's Brief, page 20A).

The cause of action tried to the jury resulted in a verdict for the plaintiff reading as follows:

> "We, the jury, duly empanelled and sworn to try the above entitled action, find for the plaintiff upon all the issues in the case, and against the defendant and assess plaintiff damages at $3,177.84, actual damages, and $20,000.00 as exemplary damages, amounting in all to $23,177.84. Dated this 9th day of February, 1956."

This was not an advisory verdict. It was the result of the trial of a law action.

The judgment is based on this verdict, which in turn is based on the second cause of action of plaintiff's Supplemental Complaint. This Supplemental Complaint, after describing the parties defendant, alleged that defendants well knew that no union man will work on a picketed job, and that any such picketing constitutes a signal to other workers to quit (Paragraph 8, first cause of action); that plaintiff was picketed repeatedly after it advised the defendant that it could not sign a union contract unless plaintiff's employees requested (Paragraph 10); that defendants well knew none of plaintiff's employees were members of the union and never invited any of them to join; knew that plaintiff could do nothing to influence them (Paragraph 11); that this picketing was to coerce the plaintiff *and* to damage or destroy plaintiff's business and was willful and intentional (Paragraph 12).

The foregoing allegations of the first cause of action were incorporated in the second cause of action by refer-

ence. The latter repeats that this course of action was for the purpose of seriously damaging or ruining or destroying the plaintiff (Paragraph 2), that plaintiff had contracts for electrical work with various construction contractors (Paragraphs 3, 4, 5 and 6) which the defendants picketed consecutively, causing the termination of such contracts; that South Dakota had declared it policy in a right to work law (Paragraph 7), that defendants willfully and maliciously took the described action to compel plaintiff to hire only union workers or suffer the consequences; that this conduct was malicious (Paragraph 8); that the defendants dogged plaintiff from job to job causing loss of contracts, and will continue to do so unless deterred by the imposition of more than ordinary damages. The complaint prayed for $3,177.84 actually damages and $25,000.00 exemplary damages.

As the Court's Opinion and the record show, these issues were fully supported by the evidence. The Court's instructions were responsive to these issues. No claim of error is premised on these instructions.

In South Dakota the doctrine of liability for interference with contracts is established. In the case of *Lien v. N.W. Engineering Co.* (1949), 73 S.D. 84, 39 N.W. (2d) 483, it is said:

> "One who intentionally and without reasonable justification or excuse induces one of the parties to a contract to refuse to perform according to the terms thereof, with resulting damage to the other party to the contract, may be held liable in an action to recover such damage. 30 Am. Jur., Interference, Section 18 et seq. 84 A.L.R. 43."

This was a common law action involving neither statute nor Constitutional provision. The trial court embodied this rule in its instructions 10 and 11.

The verdict and judgment in this respect are based on what this court has referred to as "common law rights of action." *International Union vs. Russell*, 356 U.S. 634, 28 S.Ct. 932.

NO REVIEWABLE QUESTIONS PRESENTED

Respondent respectfully suggests that no reviewable question has been preserved or is presented by this Petition for Certiorari. Under Division 1, page 4 of the Petition, it is asserted that the Federal questions presented were raised by the Second Amended Answer, Proposed Findings and Conclusions and Assignment of Errors. Turning to the Second Amended Answer, Appendix C, page 32A, it is seen that this presents a number of questions not urged in the Petition for Certiorari and that the only Federal question argued is that Congress by enacting the NLRA pre-empted the field of labor relations affecting Interstate Commerce (Bottom page 33A). Since the judgment is not bottomed upon Findings of Fact or Conclusions of Law and this phase of the case was ruled in petitioner's favor, Findings and Conclusions made by the trial court and those requested by petitioner are not germane here. Turning to the Assignments of Error, Appendix E, page 43A, it is seen that Assignments 2 and 3 present no Federal question urged in the Petition. Assignment 4 is based upon a Motion for Directed Verdict on the ground that the trial court was without jurisdiction "because it is involving Interstate Commerce and comes under the province of the National Labor Relations Board." We find the same language near the end of Assignment 5, page 47. Assignment 46 is ineffective because, as above indicated, it is premised upon denial of a Conclusion of Law. This had to do with the injunction phase of the case, which was ruled in favor of the petitioner. We are here concerned only with the jury verdict which depends not at all on the Findings and Conclusions of the Court.

It thus clearly appears that the above quoted language in regard to pre-emption of the field of labor relations by Congress is all petitioner can point to as the basis of the arguments made in the petition; and it is wholly insufficient. It fails completely to give counsel or the Court notice of what is now argued.

DISCUSSION OF PETITIONER'S "QUESTIONS PRESENTED"

We believe the assertion in paragraph 1, page 4, of petitioner's description of "Questions Presented," that the action was based on violation of a State statute relating solely to labor-management is incorrect. South Dakota has no labor-management relations act in the sense of a comprehensive code regulating such matters, similar to the NLRA. It does have constitutional and statutory provisions guaranteeing the right to work. The statute is quoted in the Appendix of the petition, page 51A. The constitutional provision is quoted by the South Dakota Supreme Court in its opinion. See page 4A of the Appendix. These do not provide a remedy for breach. But

> "'. . . the violation of a statutory provision containing . . . the prohibition . . . of an act which may be to his injury is generally regarded as giving rise to a . . . right of action.' 52 Am. Jur. Torts Sec. 18, page 372."

This is the basis of Respondent's common law action.

Paragraph 2, page 2 under this same heading describes subsidiary questions similarly, as not predicated upon a common law action, but upon a state law relating solely to Labor-Management relations, or where damages sought are incidental and ancillary to injunctive relief. This was not the situation. The action for damages was a separate independent tort action, gist of which was interference

with contract. This was not a case where as an incident of an equitable or injunction action the court was asked to award damages. The tort action was separately and specially tried to a jury.

Paragraph 3 asks whether the state court has jurisdiction to award damages where compensation may be secured by an action at law under the Federal Statute. This question clearly was not raised either in the Trial Court or in the Supreme Court of South Dakota, as a search of the record will reveal. See statement of the South Dakota Supreme Court at the top of page 12A of the Appendix.

Paragraph 4 of questions presented seeks to raise some question of agency relating to LMRA. This is new in the Petition for Certiorari. There is no basis for it in the record nor in the Assignments of Error relied on (Appendix E, page 43A).

Paragraph 5 questions the jurisdiction to award exemplary damages on the same grounds. This, too, is new in the Petition for Rehearing. It was not raised anywhere below.

THE FACTS

A few points need to be cleared up as to the facts of the matter.

The defendant, DeVries, business manager of Local 426 IBEW, solicited the plaintiff for a union contract without contacting any of defendant's employees. He knew none of them were members of the union, although the record shows one of them tried unsuccessfully to get in. DeVries' position was that the union might take one or two "on a permit," which is something less than membership. They could not continue work for plaintiff and the rest would have to be replaced. Plaintiff said it was up to the men. As soon as the union had a majority he would sign a contract. The situation did not change, so that on subsequent requests

plaintiff's position was consistent. It could not sign a contract. There is no question but what DeVries was asking for a union shop contract, or that his position was that he would never permit union men to work on the same job with nonunion men.

Following plaintiff's third refusal to sign a contract the picketing commenced. After plaintiff had been run off of two jobs he applied to the Court for a Restraining Order. That order was dissolved on the return date because the evidence showed that contracts on the picketed jobs had been terminated, so the trial court felt the point was moot. Robert Garrity, District Agent for the International, was present at this hearing with Mr. Weinberg, his attorney, so he fully understood the whole situation The record shows that he was in touch with DeVries from time to time by telephone and personally and he supervised the International's business in South Dakota. So the International was not without knowledge of what was going on. It had a representative in close touch with the situation. Baumgartner's were run off of six jobs after Garrity was present in Court. The International gets 70c a month per capita tax from each member of the union.

DeVries testified to his duties and identified the Constitution of the International and the by-laws of the Local, which went into evidence without objection. He said some of the money from dues is used for organizational purposes —"organizing contractors and places of business that are not organized." And of his conversation with Baumgartner, "I tried to quote him the merits or what I thought would be the merits of running a shop that would be—employ our people."

The South Dakota Supreme Court has summarized the evidence supporting the agency of DeVries for the International at page 13A of the Appendix of the petition. The evidence in the record spells out this agency with particu-

larity. Greatly simplified it amounts to this. DeVries was authorized to organize and did so for the International, which collects and retains dues or per capital tax from every member; and the International supervised these activities through its representative Garrity. Respondent takes the position that a principal cannot authorize a course of action by an agent, take and retain the fruits of its agent's actions and disclaim the agency.

THE MERITS

If it be considered that the above record suffices to raise any question, still there is no validity to the arguments made by petitioner.

The contention would be that the NLRA has pre-empted the field of labor relations to the point where nothing whatever is left to the states. This is not the law.

The position of the court has been made clear in the several decisions touching this point and particularly the Russell case, 356 U.S. 634, 78 S.Ct. 932, as appears from the following:

> "In this both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute . . . designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private rights." (78 S.Ct 938, first column)

> "To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." (78 S.Ct 938, second column)

> "Under state law presumably he could have recovered for medical expense, pain and suffering and property damages. Such items of recovery are beyond the scope of present Board remedial orders. Following the reason-

> ing adopted by us in the Laburnum case, we believe that state jurisdiction to award damages for these items is not pre-empted. . . . We conclude that an employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here." (id. page 939.)

In Russel, the plaintiff was an employee. In Laburnum, 347 US 656, 74 SCt 833, the plaintiff was an employer. Baumgartners was the employer, and had not a single union worker. In that situation, a much stronger case for state court jurisdiction results, as the following from the dissent in Russell points out:

> "The defendant in Laburnum, on the other hand, was a total stranger to the employer's collective bargaining contract, and could claim the membership of not a single worker. There was no prospect of a continuing relationship between the parties to the suit and no need for concern over the climate of labor relations that an action might impair. The defendant was attempting to coerce Laburnum's employees, either by direct threats or employer pressures, to join its ranks. Such predatory forays are disfavored when undertaken by peaceful picketing, ... Finally, the effect of punitive damages in cases such as the present one is entirely different from that which results from the recovery sanctioned in Laburnum. 347 U.S. 656, 74 S.Ct. 833. Since the wrong in Laburnum was committed against an employer, the damages were probably the extent of the defendant's liability for that particular conduct."

As appears from the foregoing, the petitioner has misapprehended the effect of the *Laburnum*, Russell,[1] and Garmon[2] cases.

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[1] 356 *US* 634, 78 *SCt* 932
[2] 353 *US* 26, 77 *SCt* 607

Under paragraph 2, page 10, petitioner argues that Section 303(b) LMRA provides an exclusive remedy. This ignores the provisions in the statute for suit in the U.S. District Court "or in any other court having jurisdiction of the parties," as well as the recent decisions of this court. Nothing in the language of the statute indicates an intention that this shall be an exclusive remedy. The most that can be said for it is that it indicates an intention that the defendants shall be liable for wrongful acts. In arguing, page 12, that the plaintiff did not seek redress in a common law tort action, petitioner is wrong. The second cause of action of the Supplemental Complaint upon which the judgment is based is most certainly a common law action in tort for "intereference."

Until this Petition for Certiorari, the defendants never suggested that Section 303(b) of the LMRA applied. Surely there is nothing in the statement of Senator Taft (LMRA Legislative History, page 1317) supporting petitioner's position. On the contrary, this and the language of Section 303(b), as well as the Leburnum case, clearly support the right to maintain such damage actions as this.

The petitioner has similarly misapprehended the statement of the South Dakota Supreme Court in regard to this point. (Their footnote, bottom of page 12 of the Petition). The truth is that Plaintiff asserted no rights under Section 303(b) and defendant asserted no defense premised thereon. (Opinion, South Dakota Supreme Court, bottom page 11a, top page 12a of the Petition).

The Taft-Hartley Law does not pre-empt the part of the labor field occupied by the right to work laws as evidenced by Section 14(b) of the act reading:

> "Nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of

employment in any state or territory in which such execution or application is prohibited by state or territorial law."

This specifically reserved to the states this portion of the field. Since the right to enact such laws was recognized by Taft-Hartley, the right to enjoy the benefits of such laws is not to be taken away by rendering them sterile so that no rights flow from them.

CONCLUSION

In the light of the foregoing it is respectfully submitted that the Petition for Certiorari should be denied.

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